TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~454.~~ 209

BENJAMIN F. BUTLER, PLAINTIFF IN ERROR,

vs.

ALEXANDER A. THOMSON AND WILLIAM THOMSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 25, 1874.

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1 In the circuit court of the United States for the southern district of New York, in the second circuit.

Pleas before the judge of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court-rooms in the city of New York, of the term of October, 1867.

Witness the honorable Samuel Blatchford, judge of the said court.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 20th day of November, in the October term, one thousand eight hundred and sixty-seven, before the justices of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the city of New York, in the said district, comes Benjamin F. Butler, by Edward Seymour, his attorney, and brings then there into the said court, before the aforesaid justices thereof, his certain declaration against
2 Alexander A. Thompson and William Thompson in the words and figures following, that is to say:

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Benjamin F. Butler, of Boston, a citizen of the State of Massachusetts, plaintiff in this suit, by Edward Seymour, his attorney, complains of Alexander A. Thompson and William Thompson, of New York, citizens of the State of New York, defendants, in a plea of trespass on the case upon promises. For that whereas heretofore, to wit, on or about July 11th, 1867, at New York, to wit, the said city and county of New York, said defendants, copartners in business as the firm of "A. A. Thompson & Co.," bargained for and bought of said plaintiff, doing business under the name of and as "Butler & Co.," and said plaintiff, at the special instance and request of said defendants, then and there bargained and sold to them seven hundred and five (705) packs first quality Russia iron, to arrive at New York, to wit, the port of New York aforesaid, by ship or vessel, of the following sizes, marks, or numbers, viz, $\frac{7}{10}$, $\frac{8}{15}$, $\frac{9}{100}$, $\frac{10}{150}$, $\frac{11}{175}$, $\frac{12}{115}$, $\frac{13}{100}$, $\frac{14}{100}$, at the rate or price of twelve and $\frac{3}{4}$ cents per pound, payable in gold, and for cash, actual tare; iron
3 due about September 1st, 1867, to be paid for by said defendants to said plaintiff on its arrival as aforesaid, and then to be taken, carried and cleared away within a reasonable time thereafter by defendants; and in consideration thereof, and that said plaintiff, at the like special instance and request of said defendants, has then and there undertaken and faithfully promised to suffer and permit said defendants to take, carry, and clear away said iron so purchased by them of said plaintiff, on its arrival at aforesaid New York, from the ship or vessel having it on board, and then and there to deliver the same to them on the payment of said purchase-money for the same, they, said defendants, undertook, and then and there faithfully promised said plaintiff, to accept the said iron of and from him, and so to take, carry, and clear away the same, and to pay the said purchase-money therefor to said plaintiff, as aforesaid.

And, altho' said plaintiff afterwards and within a reasonable time after the making of the said promise and undertaking of said defendants upon or about September 28th, 1867, notified said defendants of

the arrival of said iron at said port of New York, whereat the
4 ship or vessel having the same on board arrived—viz, in the month of September, 1867—in the ordinary course of trade and navigation therewith, and that plaintiff was then and there ready and willing to suffer and permit said defendants to take, carry, and clear away said iron from said ship or vessel, and would have suffered and permitted said defendants to take, carry, and clear away said iron so purchased by them of plaintiff as aforesaid upon payment of the purchase-money to plaintiff for the same; and was then and there ready to deliver said iron to said defendants as soon as it could be discharged from said ship or vessel in the ordinary course of delivery, and according to the usage and custom of trade in the premises, and of which defendants had notice, and were requested to take away said iron and pay for the same, yet they refused to accept and pay for the same.

And, altho' said iron, notwithstanding aforesaid notice until the said time when the same was to have been taken, carried, and cleared away and paid for by said defendants, and for a long time thereafter—to wit, until October 16th, 1867—remained, continued, and was ready to
5 be delivered to the defendants, and although during the whole of said time said plaintiff was ready and willing to suffer and have suffered and permitted defendants to take, carry, and clear away said iron so purchased by them, as aforesaid, upon payment of the purchase-money to him, and was ready then and there and offered to deliver said iron, and the said iron was ready to be taken, carried, and cleared away by defendants, of which they, on said October 16th, 1867, had notice, and altho' plaintiff hath always from the time of making his said promise and undertaking hitherto well and truly performed the said conditions of sale in all things therein contained on his part as seller to be kept and performed, yet said defendants, not regarding their said promise and undertaking, as aforesaid, but contriving and fraudulently intending to deceive and defraud said plaintiff in this behalf, did not nor would, altho' requested so to do, then, or at any other time, accept or take, carry, or clear away said goods, or any part thereof, or pay the purchase-money for the same, or any part thereof, to the plaintiff, but wholly neglected and refused so to do, and still refuse so to do.

And thereupon afterwards, and after the expiration of a reason-
6 able time, after said October 16, 1867, and while the said iron remained uncleared and unpaid for, to wit, on or about October 31, 1867, he, plaintiff, did resell the said iron at a much less price than the price so to have been paid by said defendants for the same, to wit, a a loss and deficiency of two and $\frac{3}{4}$ cents gold on 152,978 pounds, the weight of said iron, in value at current market rate or price amounted to $\$6{,}419\frac{34}{100}$ dollars paper currency of the United States of America, besides the costs and charges of such resale, to wit, $\frac{3}{4}$ of one per cent. in gold, in aforesaid currency of the value of $\$161\frac{77}{100}$ dollars together, being equivalent to the sum of $\$6{,}581\frac{11}{100}$ in currency of said United States; all of which said several promises said defendants on the day and year last aforesaid had notice, and were then and there requested by the said plaintiff to pay him the said loss and deficiency, and the costs and charges of said resale in gold, being equivalent to the sum of $\$6{,}581\frac{11}{100}$ dollars, as aforesaid, currency, and which said sum defendants then and there ought to have paid to said plaintiff; and whereas, also, the said defendants afterwards, to wit, on the 31st day of
7 October, 1867, at the city and county of New York, were indebted to the said plaintiff in the sum of ten thousand dollars for divers goods, wares, and merchandize by the said plaintiff, before then bar-

gained and sold to the said defendants, and at their special instance and request, and being so indebted they, the said defendants, afterwards, to wit, on the day and year last aforesaid, and then and there faithfully promised to pay him, said plaintiff, said last-mentioned sum of money when they, said defendants, should be thereunto requested.

Nevertheless, said defendants, altho' requested, have not as yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to plaintiff; but to pay the same or any part thereof to plaintiff, the said defendants have hitherto altogether refused, and still do refuse, to the damage of plaintiff of ten thousand dollars, and therefore the said plaintiff brings suit, &c.

And the said defendants, Alexander A. Thomson & William Thomson, by Foster & Thomson, their attorneys, come and defend the wrong and injury, and say that they are not guilty of the said supposed grievances above laid to their charge in manner and form as the said plaintiff
8 hath above thereof complained against them, &c.

And the said defendants say that they do not owe the said sum of money above demanded, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against them, and the said defendants say that they did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against them, and of this they put themselves on the country.

And the said defendants further say that the said plaintiffs, on or about July 11th, 1867, in the city and county of New York, agreed to sell and deliver to these defendants the said above-mentioned in said declaration stated 705 packs first quality Russia sheet-iron at the price of 12¾ cents per pound, to arrive about September 1st, 1867, but that, altho' the said defendants were ready and willing to carry out the contract on their part, and to take and receive the said iron and pay the purchase-money therefor, the said plaintiff failed and refused to carry out the said contract on his part, and to deliver the said iron, to
9 the damage of the defendants of the sum of ten thousand dollars.

Wherefore these defendants demand judgment against the plaintiff for the said sum of ten thousand dollars and their costs.

Therefore, the issues above joined are ordered by the said circuit court to be tried at a stated term of the said court, appointed to be held at the court-rooms thereof, in the city of New York, on the third Monday of October, in the year 1868.

And now at this day, to wit, the 23d day of February, 1869, being as yet of the said October term, 1868, before the Honorable Samuel Blatchford, one of the judges of this court, at a stated term thereof, held at the city of New York, in the southern district of New York, came as well the above-named plaintiff as the above-named defendants, by their respective attorneys as aforesaid, and the said parties having signed and filed a stipulation with the clerk of this court waiving a trial by jury, thereupon the cause was tried by the Honorable Samuel Blatchford without a jury, in conformity with the said stipulation, and he finds the facts that the defendants are not guilty of the said supposed grievances laid to their charge in the manner and form as the said plaintiff hath thereof complained against them, and that the said defendants
10 do not owe the said sum of money as in the declaration of plaintiffs alleged, or any part thereof, and that the said defendant did not undertake or promise in manner and form as the said plaintiff hath thereof complained against them. And the court doth assess six cents for the damages by the defendants sustained in the premises over

and above their costs and charges, and for the costs and charges by the defendants about their suit in this behalf expended, to thirty-one $\frac{75}{100}$ dollars. And because the said court of the people before the aforesaid justice thereof, now here, is not yet advised what judgment to give of and upon the premises, therefore the process is continued between the parties aforesaid of the pleas aforesaid in the same court before the justice thereof, until the 27th day of March, 1874, of the term of October, one thousand eight hundred and seventy-three, at the United States court-rooms in the city of New York, and the same day is given to the parties aforesaid to hear the judgment of the said court.

Thereupon upon which day came the parties by their respective at-
11 torneys, whereupon all and singular the premises being seen and by the court here fully understood, and mature deliberation being thereupon had, it appears to the said court now here that the judgment aforesaid of the court aforesaid in form aforesaid given is in all respect good and valid in the law, anything in the plaintiff's bill of exception contained to the contrary thereof in anywise notwithstanding.

Therefore it is considered by said court that the said defendants are not guilty of the said supposed grievances laid to their charge in the manner and form as the said plaintiff hath thereof complained against them, and that the said defendants do not owe the said sum of money as the declaration of plaintiff alleged, or any part thereof, and that the said defendants did not undertake or promise in manner and form as the said plaintiff hath thereof complained against them.

And it is furthered considered by the said court that the said defendants do recover against the said plaintiff their said damages and costs and charges by the court in form aforesaid assessed, and also the sum of thirty-one dollars and seventy-five cents for the said costs and charges as taxed by the said court now here adjudged of increase to the
12 defendants, and with their assent, which damages, costs, and charges in the whole amount to thirty-one dollars and twenty-five cents.

And the said plaintiffs in mercy, &c.

Judgment signed this 17th day of 1874.

R. E. STILWELL,
Deputy Clerk.

(Endorsed:) U. S. circuit court. Benjamin F. Butler vs. Alexander A. Thomson and William Thomson. Judgment. Foster & Thomson, def't's att'ys, 69 Wall st. Filed April 17, 1874.

13 Circuit court of the United States for the southern district of New York, in the 2d circuit.

BENJAMIN F. BUTLER
vs.
ALEXANDER A. THOMSON ET AL.

This was an action on the case brought by plaintiff against defendants to recover for a deficiency on a resale of a certain quantity of sheet-iron bargained and sold to defendants to arrive from Russia, which they refused to accept or receive on its arrival at New York City, although plaintiff was then and there ready and willing, and offered to deliver the same on being paid the purchase-money therefor.

The declaration consisted of a special count for goods bargained and sold, and the common count for the same. (Take it in.) The plea consisted of the general issue, with a special plea in verification. (Take it

in.) The issue in this cause came on to be tried at a circuit court held at the court-room, No. 41 Chambers street, New York City, in said district, before his honor Samuel Blatchford, judge of the district court of the United States in said district, presiding thereat, on February 23d, 1869, without a jury, the same having been theretofore duly waived.

On the trial, BENJAMIN F. BUTLER was called as a witness on the part of the plaintiff, and testified, viz:

I am the plaintiff in this suit, and reside and do business in the city of Boston, under the firm-name of "Butler & Co." No one but myself compose the firm. I know the defendants. They reside and do business in the city of New York. They are partners in business as the firm of "A. A. Thomson & Co." I had business dealings with them in July, 1867. They purchased of me, through White & Hazzard, metal brokers, in New York City, a large quantity of sheet-iron, to arrive from Russia.

JOHN E. WHITE, a witness called by the plaintiff, testified, viz:

I now reside at Boston. I lately lived in Brooklyn City, and did business as a metal broker in New York City, in July, 1867. I then was in partnership with Mr. Hazzard, and we did business together as the firm of "White & Hazzard." I know the parties to this suit, and our firm has done business for both. In July, 1867, plaintiff authorized us to sell a large quantity of sheet-iron, to arrive from Russia. I offered it for sale. I offered it to defendants at the price I was to sell it at,
15 and at the same price at which I offered it to the defendants they accepted it, and I closed it for the parties.

Q. Did you write Butler you had a party ready to purchase it?

(Objected to; objection sustained, and ruling duly excepted to.)

Q. Did your firm execute any paper as brokers in the transaction between Butler and Thomson & Co.?

A. Yes, sir; we did.

(Plaintiff produces a paper signed White and Hazzard, brokers, and shows it to witness, and asks him,)

Q. Did you sign that?

A. No, sir, our firm did. That is the firm's signature made by my partner. The handwriting in it is Mr. Hazzard's.

(Paper offered and read in evidence and marked Ex. A., and is as follows, viz:

Copy Exhibit A.

"NEW YORK, *July* 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first quality Russia sheet-iron, to arrive at New York, at twelve and three-quarters (12¾) cents per pound, gold, cash, actual tare.

"Iron due about Sept. 1, '67.

"WHITE & HAZZARD,
Brokers.

16 "$\frac{7}{10}$, $\frac{8}{15}$, $\frac{9}{100}$, $\frac{10}{150}$, $\frac{11}{175}$, $\frac{12}{115}$, $\frac{13}{100}$, $\frac{14}{40}$.")

Q. When your firm drew up that memorandum did it also deliver one to Thomson & Co., in the transaction?

A. We did, sir.

Q. Was it a bought note?

A. It was.

(The witness here stated that the paper heretofore shown him and in evidence was drawn up with his knowledge, and by his direction.)

Q. Did you deliver to Thomson & Co. a memorandum of the transaction?

A. I don't remember that I delivered it in person. It was drawn up in the same handwriting, but I saw a duplicate of Exhibit A in the possession of Thomson & Co., subsequently.

(Defendants, on call of plaintiff's counsel, produce the paper testified to have been delivered to them by witness' firm.)

The paper is produced and shown to witness.

Q. Is that the paper?

A. Yes, sir. (Paper marked Ex. B, and is as follows:

Copy Exhibit B.

"NEW YORK, *July* 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thom-
17 son & Co., New York, seven hundred and five (705) packs first-quality Russia sheet-iron, to arrive at New York, at twelve and three-quarters (12¾) cents per pound, gold, cash, actual tare.

"Iron due about Sept. 1, '67.

"WHITE & HAZZARD, *Brokers.*

"$\frac{7\frac{1}{2}}{10}$, $\frac{8}{15}$, $\frac{9}{100}$, $\frac{10}{150}$, $\frac{11}{175}$, $\frac{12}{115}$, $\frac{13}{100}$, $\frac{14}{40}$.")

(Plaintiff's counsel thereupon offered said paper, Exhibit B, in evidence. Defendants' counsel objected, upon the ground that it was only a duplicate of Exhibit A, and was unstamped. Objection sustained, and duly excepted to. Thereupon plaintiff's counsel re-offered the original in evidence, to which defendants' counsel objected, and on which the court reserved its decision.)

The court questioned the witness, viz:

Q. Tell what transpired.

A. I sold the iron to Thomson & Co. They accepted it. They bought it through us, and I entered the transaction on my book. From that entry I drew off this memorandum. A memorandum of such entry was given or sent to Mr. Butler, and one to Thomson & Co.

(By counsel.) Was there any written contract other than the one you have produced here?

18 A. No, sir.

Q. How did Thomson & Co. come to have anything to say to you about this iron?

(Objected to and duly excepted to.)

THE COURT. I must decide that the two papers do not constitute a written contract of purchase and sale within the statute of frauds of the State of New York.

DEFENDANTS' COUNSEL. Then I move for a non-suit.

THE COURT. I find for the defendants.

To which decision of the said judges the plaintiff's counsel did then and there except on plaintiff's behalf.

And because none of the foregoing evidence and exceptions appear on the record, the said justice hath herewith set his hand and seal at the city of New York this 23d day of February, 1869.

SAMUEL BLATCHFORD. [L. S.]

We consent to the settlement of the case in the above-entitled action in the foregoing form.

New York, December 30, 1873.

FOSTER & THOMSON,
Att'ys for Def'ts.
EVARTS, SOUTHMAYD & CHOATE,
Pl'ff's Att'ys.

19 (Endorsed:) United States circuit court, southern dist. of New York. Benjamin F. Butler *vs.* Alexander A. Thomson *et al.* Case. Evarts, Southmayd & Choate, pl'ff's att'ys. Filed February 10, 1874.

20 United States circuit court.

BENJAMIN F. BUTLER
vs.
ALEXANDER A. THOMSON AND WILLIAM THOMSON.

BLATCHFORD, J.:

This suit was tried by the court without a jury, in February, 1869. It was brought in November, 1867. The declaration, which is in assumpsit, alleges that on the 11th of July, 1867, the defendants, who did business as A. A. Thomson & Co., bargained for and bought of the plaintiff, who did business as Butler & Co., and the plaintiff bargained and sold to the defendants, 705 packs first quality of Russia sheet-iron, to arrive at New York by ship or vessel, of certain sizes, marks, or numbers, specifying them, at the rate or price of 12¾ cents per pound, payable in gold and for cash, actual tare, iron due about September 1st, 1867, to be paid for by the defendants to the plaintiff on its arrival as aforesaid, and then to be taken away within a reasonable time thereafter by the defendants; that in consideration thereof, and that the plaintiff had undertaken to permit the defendants to take away the
21 iron on its arrival at New York, from the vessel having it on board, and to deliver it to them on the payment of the purchase-money for it, the defendants undertook to accept the iron of and from the plaintiff, and to take it away, and to pay the purchase-money therefor to the plaintiff; that although the plaintiff, on or about the 28th of September, 1867, notified the defendants of the arrival of the iron at New York, and that the plaintiff was ready to permit the defendants to take away the iron from the vessel having it on board, and would have done so on the payment to the plaintiff of the purchase-money therefor, and was ready to deliver the iron to the defendants as soon as it could be discharged from the vessel, yet the defendants refused to accept and pay for the same, and that thereafter the plaintiff resold the iron at a loss of 2¾ cents gold on its weight, 152,978 pounds, besides ¾ of one per cent. expenses of resale. The suit is brought to recover the amount of this loss. The defendants plead the general issue and a special plea setting up a failure by the plaintiff to carry out the contract on
22 his part and to deliver the iron.

On the trial it appeared that the plaintiff employed Messrs. White & Hazzard, a firm of metal-brokers doing business in New York, to sell for him a large quantity of sheet-iron, to arrive from Russia. The brokers offered it to the defendants, verbally, at a price named, and the defendants verbally accepted it at that price. The brokers then signed two papers, in the same words as follows:

"NEW YORK, *July* 10th, 1867.

Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thompson & Co., New York, seven hundred and five (705) packs first-quality Russia sheet-iron, to arrive at New York, at twelve and three-quarter (12¾) cents per pound, gold, cash, actual tare. Iron due about Sept. 1, '67.

"WHITE & HAZZARD, *Brokers.*"

Below was a memorandum of the numbers of packs of each, of eight different sizes, numbers, or marks. One of these papers so signed was delivered by the brokers to the plaintiff, and one to the defendants. This paper was the only written contract between the parties. The court held that the two papers did not constitute a written contract of purchase and sale, within the statute of the State of New York, and found for the defendants. The plaintiff now moves for a new trial.

23 The statute of New York (2 R. S., 136, § 3) is in these words: "Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless, (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase-money." The 8th section of the same title provides that "every instrument required by any of the provisions of this title, to be subscribed by any party, may be subscribed by the lawful agent of such party."

As none of the iron was accepted and received by the defendants, and none of the purchase-money of it was paid by the defendants, the sole question is, whether a note or memorandum in writing, such as is required by the statute, was made and subscribed as required. If not, the contract for the sale was void.

The paper in question is not signed by the defendants. It is signed White & Hazzard, brokers. It does not contain any words of *of* purchase, nor does it contain the words "agree or agreement." The

24 defendants are the party sought to be charged by the contract of purchase which is set up in the declaration. To charge them, the statute requires that a written note or memorandum of such contract of purchase shall have been made, and that such written note or memorandum shall have been subscribed by the defendants. The contract of purchase by the defendants is distinct from the contract of sale by the plaintiff. The plaintiff might very well have bound himself by a contract of sale, in writing, and subscribed as required, so as to have made himself liable thereon to the defendants, while the defendants did not bind themselves by a contract of purchase in writing, and subscribed as required, so as to have made themselves liable thereon to the plaintiff; such contracts, binding one party to do a certain thing, and leaving the other party free, are not uncommon. Although the agreement of sale on the part of the plaintiff, and the consideration for such agreement, may be sufficiently stated, in writing, on the paper in question, and it may be sufficiently subscribed by the plaintiff to give to the defendants a right of action against the plaintiff for a breach of such agreement of sale, it by no means follows that the plaintiff could suc-

25 cessfully resist such action on the ground that he had no right of action, on the paper in question, against the defendants. This is the view of the court of appeals of New York in Justice vs. Lang, (42 N. Y., 493.) The written instrument cannot be aided by the parol evidence that the defendants verbally accepted the offer made. If, moreover,

it were even to be conceded that the defendants, in judgment of law, gave to the brokers authority to sign, on behalf of the defendants, a contract of purchase, no such contract was signed by the brokers. If the plaintiff himself had signed two papers in the language of those signed by the brokers, and had delivered one of them to the defendants and retained one himself, the paper would have contained only a contract by the plaintiff to sell, and would not have contained any contract by the defendants to purchase, on which this suit could have been maintained against the objection now made. Nor would it have made any difference if the defendants, as well as the plaintiff, had signed the two papers. No contract to purchase could have been enforced against the defendants in the face of such objection. The case would not have been one of an agreement inter partes, subscribed by both of the contracting parties. The signature of the defendants could not convert into
26 an agreement inter partes what was not such by its terms and on its face. Where both parties sign an agreement inter partes, a promise or covenant will be implied by one to do or perform that which is stated to be the consideration of the acts expressly undertaken by the other.

A promise is not, under all circumstances, implied from the fact that a promise has been made by another party to which that sought to be implied would be the correlative, and so the parties placed under mutual obligations to each other. In the present case there was no transfer of property to the defendants. The written paper is, in form, unilateral, and contains no contract of purchase enforceable against the objection made. It is, and ought to be, the policy of the courts not to relax further the principles which do not permit a written contract to be explained by parol testimony, instead of seeking to take out of the statute of frauds cases which are within its letter. (Grant v. Naylor, 4 Cranch, 224.) I do not regard the decision in the case of Salmon Falls M'f'g Co' v. Goddard (14 Howard, 446) as in conflict with these views. There the suit was against the purchaser; and the written memorandum
27 was signed by the purchaser, and contained the word "purchasers." It results that the motion for a new trial must be denied.

J. H. Choate, for the plaintiff.

E. H. Owen, for the defendants.

(Endorsed:) U. S. circuit court. Benjamin F. Butler *vs.* Alexander A. Thomson & William Thomson. Decision M'ch 27, 1874. Filed March 27th, 1874.

23 Supreme Court of the United States.

BENJAMIN F. BUTLER, PLAINTIFF IN ERROR,
against
ALEXANDER A. THOMSON AND WILLIAM THOMSON.

Of October term, in the year of our Lord one thousand eight hundred and seventy-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Benjamin F. Butler, by Evarts, Southmayd and Choate, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants, against

the said plaintiff; whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff against the said defendants. And the said plaintiff prays that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings
29 aforesaid, as the same appears more fully therein, may be reversed, annulled, and altogether held for nothing, and that the plaintiff may be restored to those things which he has lost by reason of the said judgment.

EVARTS, SOUTHMAYD & CHOATE,
Attorneys for Plaintiff in Error.

(Endorsed:) U. S. Supreme Court. Benjamin F. Butler, plaintiff in error, vs. Alexander A. Thomson and William Thomson, defendants in error. Assignment of error. Evarts, Southmayd & Choate, att'ys for pl'ff in error.

Service of a copy of the within is admitted this July 8th, 1874.

FOSTER & THOMSON,
Att'ys for Def'ts in Error.

Filed July 8, 1874.

30 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

BENJAMIN F. BUTLER
vs.
ALEXANDER A. THOMSON AND WILLIAM THOMSON.

Know all men by these presents, that we, Benjamin F. Butler, of Boston, in the State of Massachusetts, and J. Q. A. Butler, of 92 Beekman st., in the city, county, and State of New York, are held and firmly bound unto the above-named Alexander A. Thomson and William Thomson in the sum of five hundred and seventy-five dollars, to be paid to the said Thomsons, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the twenty-ninth day of June, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas the above-named Benjamin F. Butler has prosecuted a writ of error to the supreme court of the United States, to reverse the judgment rendered in the above entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Benjamin F. Butler shall prosecute said writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

B. F. BUTLER. [L. S.]
JOHN Q. A. BUTLER. [L. S.]

Sealed and delivered and taken and acknowledged by the said B. F. Butler this 29th day of June, 1874, before me.

ELIAS MERWIN,
Commissioner of U. S. Circuit Court for District of Massachusetts.

Sealed and delivered, and taken and acknowledged by said J. Q. A. Butler this 30th day of June, 1874, before me.

HENRY EDGAR WOODWARD,
Notary Public, (195,) *N. Y. Co.*

31 UNITED STATES OF AMERICA,
Southern District of New York, ss:

J. Q. A. Butler, being duly sworn, deposes and says that he is worth the sum of twelve hundred dollars over and above all his just debts and liabilities.

JOHN Q. A. BUTLER.

Sworn to this 30th day of June, A. D. 1874, before me.
[L. S.] HENRY EDGAR WOODWARD,
Notary Public, (195,) *N. Y. Co.*

We hereby approve the foregoing bond as to form and execution and sufficiency of sureties, June 30, 1874.

FOSTER & THOMSON,
Sol's for Defendants.

(Indorsed:) Vol. , page . U. S. circuit court. Benjamin F. Butler vs. Alexander A. Thomson et al. Bond for costs on writ of error. Evarts, Southmayd and Choate, pl'ff's att'ys. Filed this day of , 187 .

The within bond is hereby approved. New York, July 1, 1874.
SAML. BLATCHFORD, *D. J.*

Filed July 1, 1874.

32 UNITED STATES OF AMERICA, *ss:*

To Alexander A. Thomson and William Thomson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Benjamin F. Butler is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, this first day of July, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] SAML. BLATCHFORD.

34 (Indorsed:) United States Supreme Court. Benjamin F. Butler v. Alexander A. Thomson and William Thomson. Citation. Evarts, Southmayd & Choate, attorneys for plaintiff in error.

Service of a copy of within admitted this 1st July, 1874.
FOSTER & THOMSON,
Defend'ts' Sol'rs.

Filed July 1, 1874.

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York greeting:

Because, in the record and proceedings, as also in the rendition of

the judgment of a plea which is in the said circuit court, before you or some of you, between Benjamin F. Butler, plaintiff, and Alexander A. Thomson and William Thomson, defendants, a manifest error hath happened, to the great damage of the said Benjamin F. Butler, as is said and as appears by his complaint:

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this first day of July, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed. July 1st, 1874.
SAM'L BLATCHFORD, *D. J.*

b UNITED STATES OF AMERICA,
Southern District of New York, ss:

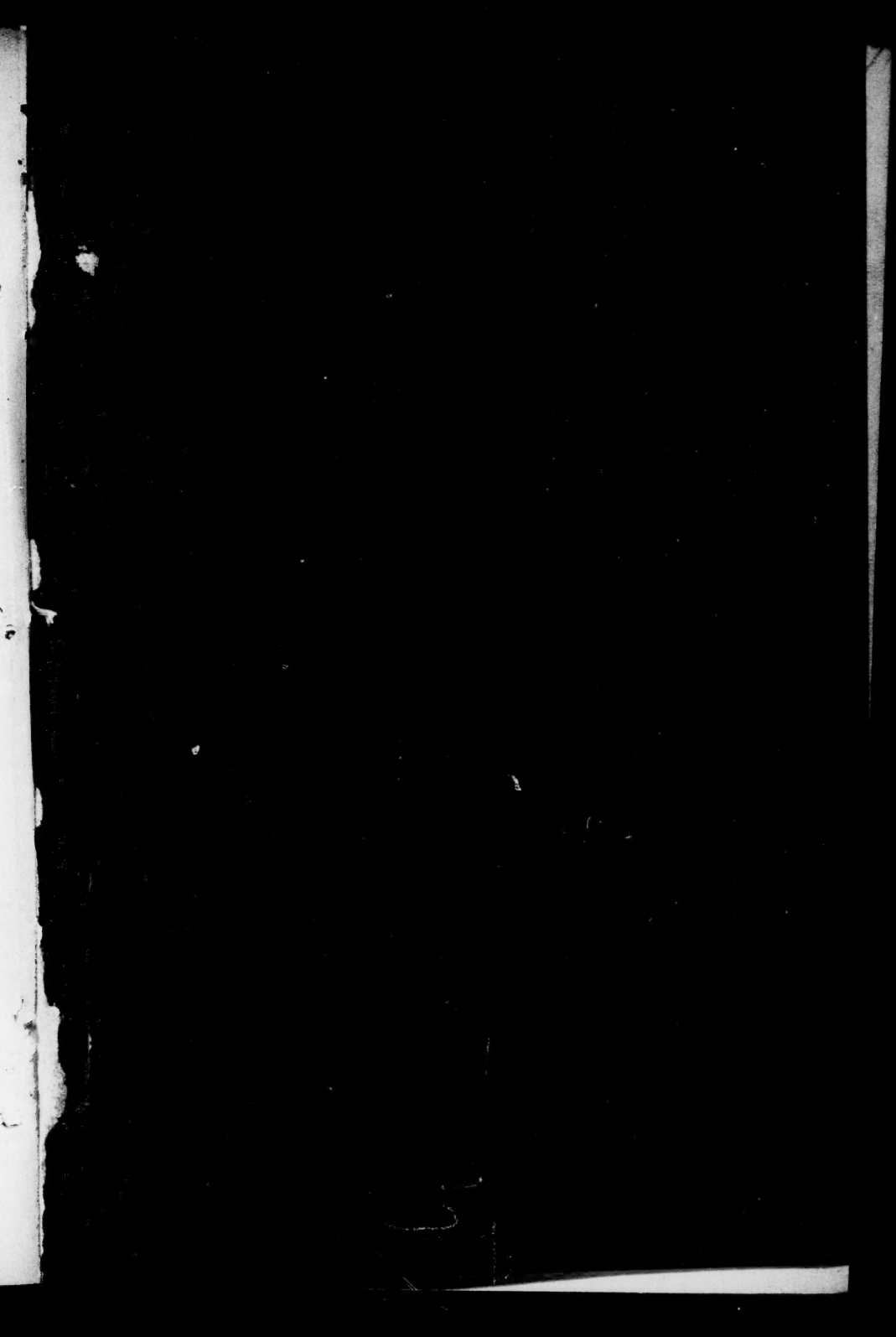
I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from one to thirty-one, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Benjamin F. Butler against Alexander A. Thomson and William Thomson, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 22d day of July, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the said United States the ninety-ninth.

[SEAL.] KENNETH G. WHITE,
Clerk.

(Indorsed:) U. S. Supreme Court. Benjamin F. Butler, plaintiff in error, against Alexander A. Thomson and William Thomson, defendants in error. Writ of error. Evarts, Southmayd and Choate, attorneys for plaintiff in error. I hereby allow the within writ. New York, July , 1874. Filed July 1, 1874.

(Indorsement on cover:) No. 454. Benjamin F. Butler, plaintiff in error, vs. Alexander A. Thomson and William Thomson. S. New York C. C. U. S. Filed 25 July, 1874.



EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

Supreme Court

OF THE UNITED STATES.

BENJAMIN F. BUTLER, Plaintiff in Error, *vs.* ALEXANDER A. THOMSON AND WILLIAM THOMSON, Defendants in Error.	No. 209.

Brief for Plaintiff in Error.

STATEMENT.

The plaintiff in error sued the defendants in the Circuit Court for the Southern District of New York for goods bargained and sold, to wit, 705 packs first quality Russia iron, to arrive, of the value, at the contract price, of $6,581.11.

The defendants pleaded *non assumpsit*, and a special plea that the plaintiff agreed to sell and deliver the iron, to arrive *about September* 1, 1867, and although

the defendants were ready to take and receive the iron, the plaintiff failed and refused to deliver the iron, to the damage of defendants $10,000.

This trial was before Judge Blatchford, the parties waiving a jury.

John E. White, sworn for the plaintiff, proved that his firm of White & Hazzard, metal brokers in New York, was acquainted with the parties, and had done business for both. In July, 1867, plaintiff authorized these brokers to sell a large quantity of sheet iron to arrive from Russia. Witness offered it to defendants, who accepted it at plaintiff's price, and he "closed it for the parties."

Witness further testified that his firm made and signed a note or memorandum of the contract, and verified, (as in the handwriting of his partner, who signed the firm signature,) the paper produced by the plaintiff, which was read in evidence, as follows:

"New York, July 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. "A. A. Thomson & Co., New York, seven hundred and "five (705) packs first quality Russia sheet iron, to "arrive at New York, at twelve and three-quarters "($12\frac{3}{4}$) cents per pound, gold, cash, actual tare.

"Iron due about Sept. 1, '67.

"WHITE & HAZZARD,
"Brokers."

Witness stated this paper was drawn up with his knowledge and by his direction, and a duplicate was given to defendants. Upon call, defendants produced a paper which the witness identified as that delivered to defendants. The paper read as follows:

"New York, July 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. "A. A. Thomson & Co., New York, seven hundred and

" five (705) packs first quality Russia sheet iron, to
" arrive at New York, at twelve and three-quarters
" (12¾) cents per pound, gold, cash, actual tare.
" Iron due about Sept. 1, '67.

" WHITE & HAZZARD,
" Brokers."

The plaintiff offered this in evidence; defendants' counsel objected, " on the ground *that it was only a duplicate of Exhibit A, and was unstamped.*"

This objection was sustained by the judge, the paper excluded, and the plaintiff excepted.

Rec., fols. 15 to 18.

The defendants objecting to the paper already in evidence, the court examined the witness as follows:

" Q. Tell what transpired?

" A. I sold the iron to Thomson & Co.; they accepted it; they bought it through us, and I entered the transaction on my books; from that entry I drew off this memorandum; a memorandum of such entry was given or sent to Mr. Butler, and one to Thomson & Co."

Plaintiff then asked the witness:

" Q. How did Thomson & Co. come to have anything to say to you about this iron?"

This question was objected to, was excluded, and the plaintiff excepted.

Rec., fol. 18.

The court then announced as follows:

" I must decide that the two papers do not constitute a written contract of purchase and sale, within the Statute of Frauds of the State of New York."

To this decision of the learned judge the plaintiff excepted.

The judge ordered judgment for defendants.

Rec., fol. 18.

Assignment of Errors.

I.—The learned judge erred in excluding the memorandum of contract delivered by the brokers to the defendants, and produced, upon call, at the trial, and thereupon offered in evidence by the plaintiff.

Rec., fol. 17.

II.—The learned judge erred in excluding the evidence offered to show the facts as to the defendants' dealing with or through the brokers in making the contract.

Rec., fol. 18.

III.—The learned judge erred in holding that "the two papers do not constitute a written contract of purchase and sale within the Statute of Frauds of the State of New York," and in thereupon giving judgment for defendants.

Rec., fol. 18.

New York Statute of Frauds.

The statute of New York (2 R. S., 136, § 3) is in these words: "Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase money."

The 8th section of the same title provides that

" every instrument required by any of the provisions of this title, to be subscribed by any party, may be subscribed by the lawful agent of such party."

The defendants had judgment against the plaintiff, who brings this writ of error.

The opinion of his Honor Judge Blatchford, is found at fols. 20 to 27 of Record.

POINTS.

First Point.—The ruling of the learned judge at the trial, rejecting the two papers delivered respectively to the buyer and seller, as not constituting "a written contract of purchase and sale within the Statute of Frauds of the State of New York," is founded, entirely, on misconception of the requirements of the statute, and is flatly repugnant to all the authorities, English and American.

By an examination of Judge Blatchford's opinion, given on a motion for a new trial, it will appear that he found no defect of authority in the broker's signature to bind the vendor and vendee, nor in the terms of the *memorandum* to bind the vendor to a contract of *sale*, whether at common law or under the statute.

But the learned judge held that the memorandum, though effectual to show a *sale*, did not import a *purchase*. He held, therefore, that, for this reason only, an action could not be maintained against the defendants as purchasers, although the contract was duly evidenced by their signature, under the statute, and although such contract was a binding contract of sale on the part of the plaintiff, on which the defendants could have sued the plaintiff on his default of performance.

Thus the learned judge held that the signature of the brokers was as effectual to bind the defendants as their own signature would have been.

He also held that the written paper, though signed by the defendants, contained no contract of *purchase* on their part.

In other words, the learned judge held, that a written memorandum containing the names of vendor and vendee (and correctly describing each as such), and containing all particulars of the subject sold, and the price at which it is sold, and signed by the vendor and the vendee, as respectively so named in the contract, binds the *vendor*, because the word "*sold*" is used in the memorandum and does not bind the *vendee*, because the word "*purchased*" is not used in the memorandum.

Or, more concisely, a memorandum signed by Thomson & Co., saying: "Butler & Co. have sold us seven hundred and five (705) packs first quality Russia sheet-iron, to arrive at New York, at twelve and three-quarter ($12\frac{3}{4}$) cents per pound, gold, cash, actual tare," is not a memorandum of a contract binding the signers to it, but a mere *certificate* of the vendees that the vendor had bound himself to them in a contract of *sale*.

Opinion of court below, fols. 24 to 27.

It is respectfully submitted that the very statement of the reasoning of the learned court exhibits the error of the decision.

Second Point.—The requirements of the memorandum, to satisfy the Statute of Frauds, have long been settled. These requirements are that the memorandum should show "the parties, the subject matter, and the consideration."

In respect of the disclosures of the *parties*, (and *this* memorandum is questioned in no other particular), all that is required is, that the names of the vendor and vendee must both appear, and the memorandum must show which is vendor and which vendee.

Benjamin on Sales, § 234 (leading cases cited, §§ 235–7).
Bailey *vs.* Ogden, 3 John., 399.
Salmon F. Co. *vs.* Goddard, 14 How., 446.
Coddington *vs.* Goddard, 16 Gray, 436.

In the case of Calkins *vs.* Falk (N. Y. Court of Appeals, 1869), the whole question was whether the memorandum showed *who* was the vendee. The majority of the court held that it did not, and a dissenting minority that it did. But *all* the judges held that the statute required no more, in respect of parties, than that it should appear which was vendor and which vendee.

38 How. Pr. Rep., 62.
Opinion of Court, p. 63.
Dissenting Opinion, p. 66.
S. C., 1 Abbott, Ct. App. Dec., 291.
S. C. (Sup. Ct.), 39 Barb., 620.

In the English case of Newell *vs.* Radford, the whole point was whether it appeared on the memorandum which was vendor and which vendee of a parcel of flour.

Parole proof was allowed that plaintiff was a baker and defendant a flour merchant. Whereupon, the memorandum was interpreted, under this proof, as showing the baker to be the vendee and the flour merchant the vendor. All the judges concurred.

Newell *vs.* Radford, L. R., 3 C. P., 52.

Third Point.—A reference to the leading propositions, in respect of memorandums under the statute, when the contracts are made by brokers and evidenced by brokers' notes, will show the memorandums given in evidence at the trial to be conformed to every requirement of the law.

"Brokers are agents for both parties, and their signature to the memorandum or note of the agreement is binding on both principals, if the memorandum be otherwise sufficient under the statute."

Benj. Sales, § 273.
Story Agency, §§ 28–31.
Coddington *vs.* Goddard, 16 Gray, 436.

The doctrine of the courts on the subject of brokers' notes shows the *memorandum* given in evidence at the time to be free from exception.

"Where the bought and sold notes and the entry in the brokers' books all correspond, no dispute can arise as to the real terms of the bargain."

It is only upon *differences* in these memoranda that the question of the effect of the variance appearing becomes material.

Benjamin Sales, § 278.

The English cases are all cited and commented upon in Benjamin on Sales, §§ 279–302.

The conclusions drawn by the learned commentator from this examination, so far as any possible question in this case is concerned, are:

That the bought and sold notes, when they correspond and state all the terms of the bargain, are

complete and sufficient evidence to satisfy the statute.

§ 296.

That either the bought or sold note, alone, will satisfy the statute, provided no variance be shown between it and the other note, or between it and the signed entry in the book.

§ 297.

That when one note only is offered in evidence, the *defendant* has the right to offer the other note or the signed entry in the book to prove a variance.

§ 298.

By a full discussion, in a recent case, of the nature and office of "bought" and "sold" notes, by Lord Campbell and the other judges of the Queen's Bench, it will appear that any adverse criticism of the notes delivered to both parties, in the present case (because of their *identity* of expression), is wholly out of place. When the notes preserve the distinguishing phrase of "bought" and "sold," the custom is to send the "bought note" to the buyer and the "sold note" to the seller, *thus putting each party in possession of his own and not of the other's contract.*

The brokers, in this case at bar, have been both accurate and intelligent, and have given each party identical originals of the contract. Both are reproductions of the entry in their books, which, logically, may be considered the actual written contract.

Sievewright *vs.* Archibald, Benjamin Sales, § 290.

The doctrine of the New York courts in respect of the sufficient memorandum under the Statute of Frauds, as laid down in the Court of Errors, by

an elaborate judgment of Chancellor Kent, has never been disturbed. It conforms to the leading English cases.

Clason *vs.* Merritt, 12 John., 102.
Clason *vs.* Bailey, 14 Id., 484.

The only change made by the Revised Statutes is to require the memorandum to be "*subscribed*" which word is used in place of "*signed*" in the old statute.

In consequence, the old doctrine that the party's *signature*, found in the body of the memorandum, would bind him is no longer law. The signature of the party (or of his agent) must now be subscribed.

Davis *vs.* Shields, 26 Wend., 341.

That the contract binds the defendants in respect of the *formalities* superadded to the common law requirements of a valid contract, would seem to be indisputable, upon all the authorities. Indeed the learned judge below imputes no defect in respect of these formalities. He holds it a good contract to bind the *vendor*, but not to bind the *vendee, because* its terms do not import a contract to *buy*, but only to *sell*.

But it is impossible to find in this contract any consideration for the vendor's obligation except the vendee's obligation. Upon this interpretation, then, it would be *nudum pactum*.

A contract, no doubt, *may* be aptly made by which a *vendor or vendee* may alone be absolutely bound, and the opposite party have an *option* to perform or not. But a contract of sale, *simpliciter* is as much a contract of purchase as of sale, for "sale" and "purchase" are interchangeable, and equally complete, expressions of the same contract.

The New York Court of Appeals has lately passed upon this question, upon a contract much more susceptible of a *unilateral* construction than the contract in this case, which is the everyday contract of purchase and sale in the market.

Justice *vs.* Lang, 42 N. Y. Rep.
Opinion of Court, pp. 495–7.

Fourth Point.—The evidence offered and excluded by the ruling of the court may have been unnecessary to the plaintiff's case, but was legitimate and admissible.

I.—The brokers' note delivered to the defendants, and offered in evidence, was certainly admissible just as much as that delivered to the plaintiff, which had already been received in evidence. Indeed, the disposition of the case by the court subsequently seems to assume it to be in evidence.

The objection as to the want of a *stamp* on the duplicate (the first note received in evidence having been stamped) was unsubstantial. It is not necessary that both copies should be stamped.

II.—The further evidence of the brokers' dealings between the parties in effecting the contract was admissible. Such evidence had already been allowed.

Fifth Point.—The judgment below should be reversed and a new trial ordered.

Wm. M. Evarts,
Of Counsel for
Plff. in Error.

E. Wells Sackett & Bro., Printers, 56 & 58 William St., N. Y.

Supreme Court

OF THE UNITED STATES.

ALEXANDER A. THOMSON and WILLIAM THOMSON,
Defendants in Error,

ads.

BENJAMIN F. BUTLER,
Plaintiff in Error.

Points of Defendants in Error.

STATEMENT OF FACTS.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York.

The cause was tried without a jury and judgment rendered for the defendants.

The plaintiff afterwards moved upon a case made for a new trial, which was denied; whereupon he sued out a writ of error to this Court.

The action is assumpsit to recover the loss upon a quantity of Russia iron which the plaintiff alleged had been bargained for and bought of him by the defendants, but which they refused to accept.

The defendants pleaded the general issue.

It was proved upon the trial that the plaintiff employed White & Hazard, of New York, metal brokers, to sell the iron; that they offered the same at certain prices to the defendants, in said city, who accepted the offer; that, afterwards, the brokers made an entry in their books from which they drew off two copies, which they subscribed; one of which they sent to the plaintiff and the other to the defendants, who were domiciled and transacted their business in New York. The note sent to the plaintiff, and upon which this action was brought, is in these words:

"NEW YORK, July 10, 1867.

"Sold, for Messrs. Butler & Co., Boston, to Messrs. "A. A. Thomson & Co., New York, seven hundred "and five (705) packs first quality Russia Sheet iron, "to arrive at New York, at twelve and three- "quarters (12¾) cents per pound gold, cash, actual "tare. Iron due about Sept. 1, 1867.

"WHITE & HAZARD, *Brokers*."

Upon the call of the plaintiff, the defendants produced the note which the brokers had sent to them, when it appeared to be an exact copy of the one sent to the plaintiff.

It was also proved that there was no other written memorandum of the contract, except the two notes and the entry in the broker's book from which they were copied.

The Court gave judgment for the defendants, holding that these papers did not prove a contract on their part to purchase the iron, within the Statute of Frauds of the State of New York.

See Opinion, Rec. fol. 20.

POINTS.

First.—There was no error in the judgment thus rendered.

I. The case is within the Statute of Frauds of the State of New York, which is in these words: "Every contract, for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless, (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or, (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or, (3) unless the buyer shall, at the time, pay some part of the purchase money."

2 N. Y. Rev. Stat., p. 136, sec. 3.

There is no evidence that the defendants accepted or received any portion of the iron or the evidence thereof, or paid any part of the purchase money; so that the question is simply whether the memorandum in writing made by the brokers was sufficient under that statute to prove a valid contract of purchase by the defendants.

II. That it was not, is clear from its language. It states, in proper terms, that the plaintiff had sold the iron to the defendants, and is competent to prove a valid contract of sale on his part, which the defendants could have enforced against him. But it does not contain any words or phrases showing that the defendants agreed to purchase the iron. As

the defendants are the parties sought to be charged in this action, it was indispensibly necessary that it should appear from the memorandum of the contract that they had purchased the iron.

Justice *v.* Lang, 42 N. Y. Rep., 493.
Davis *v.* Shields, 26 Wend., 341.

III. This is not like the case where the bought and sold notes are in proper form to bind the respective parties, but, by accident, the seller has received the sold note, and the buyer the bought note. In this case, the notes are alike in form. Both were "sold notes." Each gave notice to the party to whom it was sent, that the plaintiff had sold the iron to the defendants, but neither stated that the defendants had bought it. PATERSON, *J.*, says: "The *bought* note, delivered "to the buyer, cannot be said to be the me- "morandum of the contract signed by the "buyer's agent, in order that he may be "bound thereby, for then it would have "been delivered to the seller, not to the "buyer, and *vice versa* as to the sold note. "Can then the *sold note*, delivered to the "*seller*, be treated as the memorandum "signed by the agent of the buyer, and "binding him, the buyer, thereby? The "mere language of it shows that it can- "not."

Sievewright *v.* Archibald, 6 Eng. Law and Eq. Rep., 286 S. C., 17 Q. B. 103; 20 L. J., Q. B. 529.

IV. There are no words or phrases in the memorandum requiring any peculiar interpretation, nor which this Court can construe into an agreement by the defendants to purchase, and this Court cannot properly supply a substantive fact which is not stated

therein. It is one thing to determine the meaning and effect of a complete valid written contract, and it is another thing to take a writing which, on its face, imports no contract, and make it import one.

The note or memorandum, required by the statute, must state the contract made by the party sought to be charged, with reasonable certainty, so that it can be understood from the writing itself. Unless the essential terms of the sale or purchase can be so ascertained, it is not a compliance with the statute, and the defect cannot be supplied by parol proof, for that would at once introduce all the mischief which the statute was intended to prevent.

2 Kent Com., 511 ; Grant *v.* Naylor, 4 Cranch, 224, 235.

V. The contract is clearly unilateral, binding the plaintiff to sell, but not the defendants to purchase. Such contracts are not uncommon—they are of frequent occurrence. All the circumstances show that the brokers understood the contract in question to be of that character. If they did not, why did they enter it in that way on their book ? and why deliver to each party the evidence of a contract in that form ? If the plaintiff intended to have a contract binding the defendants to purchase, he should have taken care to have had admissible evidence to enable him to enforce it against them.

Per Cur. Thornton *v.* Kempster, 5 Taunt., 788 Chitty on Cont., 11 Ed., 548–9.

VI. The entry in the broker's book was not offered in evidence ; but if it had been, and if it had been properly subscribed by the

brokers, it would not have established a contract of purchase on the part of the defendants any more than the notes themselves. The entry was precisely like the notes which were sent to the respective parties, which, as the broker testifies, were copied from that.

Rec., fol. 15, 17.

Second.—There was no error in the rulings upon the trial.

I. The first exception was upon the ruling of the Court, as to the admissibility of the question put by the plaintiff's counsel to his witness, the broker (fol. 15). The broker was asked: "Did you write Butler that you had a party ready to purchase it?" which, being objected to, was properly excluded. It was totally immaterial whether the witness so wrote him or not.

Moreover, this ruling did not affect the decision of the case. If the question was not objectionable in form, still as there is nothing in the record showing that the answer related to a material matter, and there being no offer by the plaintiff to prove any particular facts to which the question referred, the exception is not available.

Railroad Company *v.* Smith, 21 Wall, 255, 261.

II. The second exception was to the ruling upon the admissibility of the defendants copy of the broker's note, which, upon the plaintiff's call, they had produced. The Court seems at first to have excluded it (fol. 17), although

it was, in fact, received and duly considered (fol. 18).

The note so offered was immaterial as evidence, because it was in fact a copy of the one already put in evidence. It furnished no additional evidence of the contract, and was properly excluded. It was, nevertheless, received and considered by the Court in connection with the note delivered to the plaintiff (fol. 18), which cured the error, if any. If otherwise, and if it was an error to exclude such copy, still, as such ruling could not have caused any injury, the error is not sufficient cause for a new trial.

Worrall *v.* Parmelee, 1 N. Y. Rep., 519.

Third.—The judgment of the Circuit Court should, therefore, be confirmed, with interest and costs.

FOSTER & THOMSON,
Att'ys for Def'ts.

E. H OWEN,
Of Counsel.